IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 83, Original

STATE OF MARYLAND, et al.,

Plaintiffs,

v.

STATE OF LOUISIANA,

Defendant.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF ASSOCIATED GAS DISTRIBUTORS AND BRIEF AMICUS CURIAE

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October 23, 1979

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ASSOCIATED GAS DISTRIBUTORS
Company Members

Baltimore Gas and Electric Co.
Bay State Gas Co.
The Berkshire Gas Co.
Boston Gas Co.
Bristol & Warren Gas Co.
The Brooklyn Union Gas Co.
Cape Cod Gas Co.
Central Hudson Gas & Electric Corp.
Chesapeake Utilities Corp.
City of Holyoke, Mass., Gas & Electric Dept.
City of Westfield Gas & Electric Light Dept.
Commonwealth Gas Co.
Concord Natural Gas Corp.
The Connecticut Gas Co.
Consolidated Edison Company of New York, Inc.
Delmarva Power & Light Co.
Elizabethtown Gas Co.
Fall River Gas Co.
Fitchburg Gas & Electric Light Co.
Haverhill Gas Co.
Long Island Lighting Co.
Lowell Gas Co.
Lynchburg Gas Co.
Manchester Gas Co.
New Bedford Gas & Edison Light Co.
New Jersey Natural Gas Co.
New York State Electric & Gas Corp.
Northern Utilities, Inc.
The Pequot Gas Co.
Philadelphia Electric Co.
Philadelphia Gas Works
Providence Gas Co.
Public Service Company of North Carolina, Inc.
Public Service Electric & Gas Co.
Rochester Gas & Electric Corp.
South County Gas Co.
South Jersey Gas Co.
The Southern Connecticut Gas Co.
Tiverton Gas Co.
UGI Corporation
Valley Gas Co.
Washington Gas Light Co.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Associated Gas Distributors (AGD)[1] hereby respectfully moves pursuant to Rule 42(3) for leave to file the attached brief as *amicus curiae* in this case. The consent of counsel for the plaintiffs has been obtained, but counsel for the defendant has objected.

[1]The AGD member companies are listed on the inside cover of this motion and brief.

I.
STATEMENT OF INTEREST

AGD is an unincorporated association of gas distribution companies serving over eleven million customers along this country's eastern seaboard, or approximately 25 percent of the nation's interstate natural gas customers. More than half the gas purchased by AGD members is produced on the Outer Continental Shelf (OCS) of the United States and transported through Louisiana, thus being subjected to the First Use Tax on Natural Gas (First Use Tax) imposed by that state.

AGD members are currently adversely affected by the First Use Tax. The Federal Energy Regulatory Commission (FERC) has approved a plan which permits the gas pipelines against whom the tax is levied to recoup the tax payments from their customers, the gas distributors. AGD member companies thus pay an additional 7 cents per thousand cubic feet (Mcf) of OCS gas and must pass the cost of the tax on to their customers, who are industrial, commercial and individual consumers of natural gas. AGD has a substantial and direct interest in this litigation.

II.
REASONS FOR GRANTING THE MOTION

The Louisiana First Use Tax is an unconstitutional levy on pipeline companies and, through them, gas distribution companies and consumers. The tax is in conflict with the federal scheme for the regulation of natural gas and is thus invalid under the Supremacy Clause of the Constitution. Furthermore, the tax discriminates against interstate com-

merce and cannot be fairly apportioned, a violation of the Commerce Clause of the Constitution.

The plaintiffs have consented to AGD's filing of a brief *amicus curiae.* The plaintiffs have interests which are generally similar to those of AGD. However, the plaintiff states cannot be expected to advance arguments which will treat specifically the interests of natural gas distributing companies whose competitive position is seriously threatened by the First Use Tax.

III.
CONCLUSION

Accordingly, and for the above reasons, Associated Gas Distributors respectfully urges the Court to grant the present motion so that AGD may present its views in the attached brief.

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE..... 1

ARGUMENT

The Louisiana First Use Tax Violates The Supremacy Clause And The Commerce Clause Of The United States Constitution..... 3

I. The Louisiana First Use Tax Constitutes An Impermissible Intrusion on the Authority of the FERC Under the National Gas Act and is in Violation of the Supremacy Clause of the United States Constitution 5

II. The First Use Tax Violates the Commerce Clause of the United States Constitution 9

A. The First Use Tax Discriminates Against Interstate Commerce 10

B. The First Use Tax Cannot be Fairly Apportioned and Thus Poses a Threat of Multiple Taxation..... 12

TABLE OF AUTHORITIES

Cases: Page

Atlantic Refining Co. v. *Public Service Commission,*
360 U.S. 378 (1959) 5

Boston Stock Exchange v. *State Tax Commission,*
429 U.S. 318 (1977) 11

Colonial Pipeline v. *Traigle,*
421 U.S. 100 (1975) 13

Complete Auto Transit, Inc. v. *Brady,*
430 U.S. 274 (1977) 13

Department of Revenue v. *Association of Washington Stevedoring Companies,* 435 U.S. 734 (1978) 9, 10, 13

FPC v. *East Ohio Gas Co.,*
338 U.S. 464 (1950) 10

FPC v. *Louisiana Power & Light Co.,*
406 U.S. 621 (1972) 5, 6

Halliburton Oil Well Cementing Co. v. *Reily,*
373 U.S. 64 (1963) 11

Jones v. *Rath Packing Co.,*
430 U.S. 519 (1977) 9

Malone v. *White Motor Corp.,*
435 U.S. 497 (1978) 9

Michigan-Wisconsin Pipe Line Co. v. *Calvert,*
347 U.S. 157 (1954) 13, 14

Mississippi Power & Light Co. v. *United Gas Pipe Line Co.,*
532 F.2d 412 (1976), *cert denied,* 429 U.S. 1094 (1977) 6

Northern Natural Gas Co. v. *State Corporation Commission of Kansas,* 372 U.S. 84 (1963) 8

Permian Basin Area Rate Cases,
390 U.S. 747 (1968)..... 5, 7

Philadelphia v. *New Jersey*,
437 U.S. 617 (1978)..... 12

Pike v. *Bruce Church, Inc.*,
397 U.S. 137 (1970)..... 12

Ray v. *Atlantic Richfield Co.*,
435 U.S. 151 (1978)..... 9

United Fuel Gas Co. v. *Hallanan*,
257 U.S. 277 (1921)..... 10

United Gas Pipe Line Co. v. *Mobile Gas Service Corp.*,
350 U.S. 332 (1956)..... 9

Western Live Stock v. *Bureau of Revenue*,
303 U.S. 250 (1938)..... 12

United States Statutes:

Natural Gas Act of 1938, 52 Stat. 821, 15 U.S.C. §§ 717-717w (1976), *as amended by* Act of Nov. 9, 1978, Pub. L. No. 95-617, 92 Stat. 3167 (codified at 15 U.S.C.A. §§ 717-717z (West 1974 and Supp. 1979)..... *passim*

Natural Gas Policy Act of 1978, Pub. L. No. 95-62, 92 Stat. 3350 (codified at 15 U.S.C.A. §§ 3301-3432 (West Supp. 1979))..... 4, 7

Louisiana Statutes:

West's Louisiana Revised Statutes Annotated:

§§ 47:631-646 (West 1970)..... 10

§§ 47:1301-1307 (West Supp. 1979)..... *passim*

§ 47:647 (West Supp. 1979)..... 11

Administrative Proceedings:

State of Louisiana First Use Tax in Pipeline Rate Cases, Docket No. RM 78-23:

Order No. 10-B, 44 Fed. Req. 13460 (March 12, 1979) 3, 7

Order Directing The Solicitor To Seek Either An Order To Modify Its Orders Or A Remand Of The Record, App. A., 44 Fed. Reg. 46,291 (Aug. 7, 1979)..... 4

Other Authorities:

Developments in the Law, Federal Limitations on State Taxation of Interstate Business, 75 Harv. L. Rev. 953, 964 (1962) 13

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INTEREST OF AMICUS CURIAE

Associated Gas Distributors (AGD) is an unincorporated association of gas distribution companies serving over eleven million customers along the eastern seaboard, or approximately 25 percent of the nation's interstate natural

gas customers. More than half the gas purchased and resold by AGD companies is produced on the Outer Continental Shelf (OCS) of the United States and moved through Louisiana, thus being subjected to the First Use Tax imposed by that state.

The Federal Energy Regulatory Commission (FERC or the Commission) has permitted the interstate pipelines on which the Louisiana First Use Tax is levied to recoup the full amount of the tax from their customers. This has resulted in an assessment of 7 cents per thousand cubic feet (Mcf) of OCS-produced gas against the AGD members and, in turn, against their consumer-customers.

AGD companies, as public utilities, are legally obligated to protect the interests of their customers. The First Use Tax imposed by Louisiana is directly contrary to such interests because it adds significantly to the economic burdens of gas consumers. Further, the higher pipeline rates resulting from the First Use Tax are directly contrary to the interests of the AGD companies. The increased retail rates resulting from this tax impair the competitive position of gas in the fuels marketplace. Competitive considerations are especially important in large-volume industrial fuel markets since many industries have the capacity to switch from gas to other fuels depending on the comparative retail price of such fuels.

AGD submits this brief to supplement the legal arguments presented in the plaintiffs' Brief in Support of Motion for Judgment on the Pleadings. AGD fully supports the plaintiffs' motion and concurs in the arguments presented in their brief.

ARGUMENT

The Louisiana First Use Tax Violates The Supremacy Clause And The Commerce Clause Of The United States Constitution.

The State of Louisiana's First Use Tax on Natural Gas[1] (First Use Tax), which became effective on April 1, 1979, imposes a tax of 7 cents per Mcf on the first use[2] within Louisiana of any natural gas that is not subject to a severance or production tax in Louisiana or another state and is destined for consumption outside Louisiana. The tax is assessed against the owner of the gas at the time of the first use; the natural gas companies owning the pipelines through which gas is received from the production sources in the offshore Gulf of Mexico federal domain or Outer Continental Shelf Area (OCS) and transported to other regions of the country are thus liable for the tax in the first instance. The pipelines, under a plan approved by the FERC,[3] assess a charge equivalent to the tax against their customers (many of whom are members of AGD), who in turn are obliged to pass on the tax charge to their consumer-customers. The tax has a significant impact on both industrial and individual consumers throughout the eastern half of the nation; the FERC

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[1]La. Rev. Stat. Ann. § 47:1301 *et seq.* (West Supp. 1979). The complete text of the First Use Tax statute is printed as Appendix I to the plaintiff states' Brief in Support of Motion for Judgment on the Pleadings.

[2]"Use" is defined at La. Rev. Stat. Ann. § 47:1302(8) (West Supp. 1979) to include the sale, transfer of possession, relinquishment of control, processing, treatment, or transportation to various delivery points of natural gas.

[3]State of Louisiana First Use Tax in Pipeline Rate Cases Docket No. RM 78-23, Order No. 10-B, 44 Fed. Reg. 13460, (March 12, 1979).

has estimated the revenues to Louisiana from the first year of operation of the tax at $225,000,000.[4]

The First Use Tax is an impermissible intrusion on the authority of the FERC. It is in direct contravention of the regulatory scheme established in the Natural Gas Act of 1938[5] and the Natural Gas Policy Act of 1978,[6] and is in violation of the Supremacy Clause of the United States Constitution.[7] Furthermore, the First Use Tax discriminates against and unreasonably burdens interstate commerce by protecting gas produced within Louisiana and other states which impose a severance tax on gas from the use tax. In addition, the tax cannot be apportioned fairly; upholding this tax will invite other states to pass similar taxes, burdening interstate transportation of gas with the threat of multiple taxation. For these reasons, the tax is in violation of the Commerce Clause of the Constitution.[8]

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[4]State of Louisiana First Use Tax in Pipeline Rate Cases, Docket No. RM 78-23, Order Directing the Solicitor to seek Either an Order of the Court Permitting the Commission to Modify Its Orders or a Remand of the Record, App. A., issued July 13, 1979, 44 Fed. Reg. 46,921, 46,292 (Aug. 7, 1979).

[5]15 U.S.C. § § 717-717w (1976), *as amended by* Act of Nov. 9, 1978, Pub. L. No. 95-617, 92 Stat. 3167 (codified at 15 U.S.C.A. § § 717-717z (West 1974 and Supp. 1979).

[6]Pub. L. No. 95-62, 92 Stat. 3350 (codified at 15 U.S.C.A. § § 3301-3432 (West Supp. 1979).

[7]Article VI, clause 2 of the Constitution of the United States provides as follows:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof. . . ,shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.

[8]Article I, section 8, clause 3 of the Constitution of the United States provides as follows:

> The Congress shall have power . . . to regulate commerce with foreign Nations, and among the several states, and with the Indian Tribes.

I. The Louisiana First Use Tax Constitutes an Impermissible Intrusion on the Authority of the FERC Under the Natural Gas Act and is in Violation of the Supremacy Clause of the United States Constitution.

The Natural Gas Act was passed in 1938 with the dual purpose of providing uniform legislation in those areas in which individual states were powerless to regulate, and of ensuring that consumers of natural gas were afforded a "complete, permanent, and effective bond of protection from excessive rates and charges." *Atlantic Refining Co.* v. *Public Service Commission,* 360 U.S. 378, 388 (1959); *Accord, FPC* v. *Louisiana Power & Light Co.,* 406 U.S. 621 (1972). Federal regulation over natural gas resources was deemed essential in order to maintain a balance between the states which produce natural gas and those which consume it. The economic importance of a stable and effective regulation system has resulted in a broad construction of the authority of the Federal Power Commission (FPC) and its successor agency, the FERC, to administer and enforce the provisions of the Natural Gas Act.[9] *E.g., Permian Basin Area Rate Cases,* 390 U.S. 747, 784 (1968).

The Natural Gas Act bestows on the Commission authority to regulate (1) the transportation of natural gas in interstate commerce; (2) the sale for resale of natural gas; and (3) companies engaged in such transportation or sale.[10]

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[9]Both the FPC and the FERC will hereinafter sometimes be referred to as the Commission.

[10]Act Section 1(b), 15 U.S.C. § 717(b) (1976).

The Commission discharges this responsibility through its review and, where necessary, modification of private contracts submitted by parties seeking either to initiate gas service in interstate commerce or to modify the terms and conditions (including the price or rate) of such service.[11]

Pursuant to these powers, the Commission has reviewed and licensed hundreds of contracts submitted to it by gas producers covering their sale of OCS gas to interstate pipelines. Given the comprehensive scope of Commission authority with respect to the activity and services prescribed or authorized by such contracts, the Commission is vested with primary jurisdiction to resolve disputes, enforce provisions, and otherwise regulate the conditions pertaining to the performance of these contracts. *See FPC* v. *Louisiana Power & Light Co., supra,* at 642, 647-48 (1972); *Mississippi Power & Light Co.* v. *United Gas Pipe Line Co.,* 532 F.2d 412 (5th Cir. 1976), *cert. denied,* 429 U.S. 1094 (1977).

The First Use Tax enacted by Louisiana encroaches impermissibly on the Commission's authority and ability to regulate private contracts for the sale of natural gas. For example, section 1303C of that statute reads as follows:

> Any agreement or contract by which an owner of natural gas at the time a taxable use first occurs claims a right to

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[11] Contracts providing for the initiation of interstate gas service are subject to the licensing provisions of section 7 of the Act, 15 U.S.C. § 717f (1976). Contracts pertaining to changes in the rates or other terms of authorized service are subject to Commission adjudication in accordance with section 4 of the Act, 15 U.S.C. § 717c (1976).

> reimbursement or refund of such taxes from any other party in interest, other than a purchaser of such natural gas, is hereby declared to be against public policy and unenforceable to that extent.[12]

This provision purports to invalidate contract provisions (a) that have been licensed and approved by the Commission in orders issuing certificates of public convenience and necessity to OCS gas producers, and (b) that constitute an essential element of the Commission-enforced rate regulation from which gas consumers derive substantial benefits. *Permian Basin Area Rate Cases,* 390 U.S. 747, 784 (1968).

In licensing contracts for the sale of Louisiana OCS gas, the Commission has, in many cases, approved clauses in which the producer of the gas agrees to reimburse the pipeline purchaser for expenses incurred in delivering the gas to downstream processing plants (where the producer removes valuable liquids contained in the gas stream), including any present or future taxes incident to processing-related transportation.[13] Such clauses effectively shield the gas consumer from any expense associated with processing activity (from which the consumer derives no benefit) and therefore operate as a form of rate protection consistent with

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[12]La. Rev. Stat. Ann. § 47:1303C (West Supp. 1979).

[13]*See* FERC Docket No. RM 78-23, Order No. 10-B, 44 Fed. Reg. 13460, 13462 n.16 (March 12, 1979) ("Many [contracts containing provisions which would require a producer to pay the First Use Tax] have been incorporated into certificates of public convenience and necessity issued by this Commission and the Federal Power Commission. While the Natural Gas Policy Act of 1978, Pub. L. 95-621, 92 Stat. 3350 [eliminates certain requirements of the Natural Gas Act], many existing sales of natural gas, which are subject to the First Use Tax, remain subject to the regulatory structure of the Natural Gas Act.")

the overall design of the Natural Gas Act. The unilateral act on the part of Louisiana in invalidating such contract clauses to the detriment of interstate gas consumers is an unsupportable invasion of the authority of the Commission.

This Court has previously considered, and invalidated, attempts by a state to alter the terms of the contracts which the Commission has licensed. In *Northern Natural Gas Co.* v. *State Corporation Commission,* 372 U.S. 84 (1963), the Kansas State Corporation adopted an order which required the appellant, Northern, an interstate pipeline company, to purchase gas ratably from all wells connecting with its pipeline system in each gas field in the state. Such order was in direct derogation of a contract between Northern and Republic Natural Gas Company (Republic), a producer, which required Northern to purchase gas from Republic up to the maximum production allowables set by the Commission for such wells. Northern was thus in the position of being required either to purchase more gas than it was able to transport and sell or to violate its contract with Republic. This Court held that the state commission's order might indirectly interfere with the pipeline's federally regulated cost structure and with the eventual cost to wholesale customers and determined that the order was thus invalid. The court stated:

> [A]lthough collision between the state and federal regulation may not be an inevitable consequence, there lurks such imminent possibility of collision in orders purposely directed at interstate wholesale purchasers that the orders must be declared a nullity in order to assure the effectuation of the comprehensive federal regulation ordained by Congress.

372 U.S. at 92.

Louisiana's attempt to modify the contractual relationships between natural gas pipelines and producers trespasses on the rights of the parties to such contracts and encroaches on the authority Congress and this Court have placed firmly in the hands of the Commission.[14] By acting in a manner which sets aside a significant portion of the regulatory scheme established by Congress and administered by the Commission, Louisiana has acted in violation of the Supremacy Clause of the Constitution and the First Use Tax statute must be declared invalid. *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978); *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157-58 (1978); *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977).

II. The First Use Tax Violates the Commerce Clause of the United States Constitution.

In *Department of Revenue* v. *Association of Washington Stevedoring Companies,* 435 U.S. 734, 750 (1978) this Court enumerated four requirements which must be met before a state tax affecting interstate commerce may be sustained. The tax must:

(1) be applied to an activity bearing a substantial nexus with the state;

(2) be fairly apportioned;

(3) not discriminate against interstate commerce; and

(4) be fairly related to the services provided by the state.

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[14] *See United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 344 (1956).

The First Use Tax unquestionably affects interstate commerce; this Court has held numerous times that the interstate transmission of gas constitutes such commerce. *E.g., FPC* v. *East Ohio Gas Co.,* 338 U.S. 464, 467 (1950); *United Fuel Gas Co.* v. *Hallanan,* 257 U.S. 277 (1921).

The First Use Tax cannot meet the *Department of Revenue* v. *Association of Washington Stevedoring Companies* standards because it discriminates against interstate commerce and it cannot be fairly apportioned.

A. The First Use Tax Discriminates Against Interstate Commerce.

As the plaintiffs have demonstrated,[15] the First Use Tax discriminates against pipeline companies that transport OCS gas through Louisiana and in favor of pipeline companies that transport gas produced in states, including Louisiana, imposing a severance tax against gas producers.

Pipelines purchasing gas that has been subject to a severance tax may or may not be required to absorb a portion of the tax. The proportion of the tax passed on to the pipeline company is a matter of contract; the Louisiana severance tax statute[16] in no way purports to affect the sharing of the tax burden. As demonstrated above, the First Use Tax statute voids that portion of any producer-pipeline contract that would allow the taxpayer-pipeline to recoup any portion of the First Use Tax payment from the producer. Thus, a

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[15] Plaintiffs' Brief in Support of Motion for Judgment on the Pleadings at 31-34.

[16] La. Rev. Stat. Ann. §§ 631-646 (West 1970).

pipeline transporting OCS gas through Louisiana will in every instance pay a tax of 7 cents per Mcf on the gas, while a pipeline transporting state-produced gas subject to a severance tax will pay only the amount established in the producer-pipeline contract—often far less than 7 cents per Mcf.

The impact of the First Use Tax statute is not borne by the pipeline companies. Those companies recoup the full amount of the tax from their gas distributor customers, who in turn recoup all or a portion of the tax from their consumer-customers. Thus, the retail cost of gas produced on the OCS may be up to 7 cents more per Mcf than gas produced in Louisiana.

AGD member companies are heavily reliant on OCS gas. In fact, more than half the gas purchased for distribution by the AGD companies is OCS gas, all of which is brought onshore through Louisiana. AGD members are thus subjected to a charge, the First Use Tax pass-through, that is not imposed against Louisiana distributors, who receive a tax credit that eliminates the burden of the First Use Tax.[17] The First Use Tax statute results in economic burdening of interstate gas distributors and consumers and favors Louisiana distributors and consumers. The tax provides a direct commercial advantage to local businesses at the expense of interstate commerce and is prohibited under *Boston Stock Exchange* v. *State Tax Commission,* 429 U.S. 318, 329 (1977) and *Halliburton Oil Well Cementing Co.* v. *Reily,* 373 U.S. 64, 70 (1963).

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[17]La. Rev. Stat. Ann. § 47:647 (West Supp. 1979).

The economic protectionism exhibited in the First Use Tax might be supportable if it could be viewed as a "law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *Philadelphia* v. *New Jersey,* 437 U.S. 617, 624 (1978). Without questioning the legitimacy of its purposes, the effect of the First Use Tax, imposing an expected increase of $225,000,000 in the rates paid by gas consumers, can hardly be deemed incidental.

Further, a tax which burdens interstate commerce, no matter how legitimate, may be struck down if a less burdensome alternative is available. *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137, 142 (1970). The less burdensome alternative Louisiana could have chosen was to allow the cost of the First Use Tax to be absorbed, where contractual terms so provided, by the gas producer.

Because the First Use Tax results in privileges for Louisiana pipeline companies, distribution companies and consumers to the detriment of their counterparts in other "downstream" states, the tax must be held discriminatory and in violation of the Commerce Clause of the Constitution.

B. The First Use Tax Cannot be Fairly Apportioned and Poses a Threat of Multiple Taxation.

No state may impose a tax on any aspect of interstate commerce which subjects it to "cumulative burdens not imposed on local commerce." *Western Live Stock* v. *Bureau of Revenue,* 303 U.S. 250, 255-56 (1938). The well-founded policy supporting this rule is that enterprises should be encouraged to engage freely in interstate commerce rather

than doing business only in one or a few states.[18] The Court has recently held that the movement of goods in interstate commerce is subject to taxation by individual states, but only where such tax is capable of being reasonably apportioned. *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274, 286 (1977); *see Colonial Pipeline* v. *Traigle,* 421 U.S. 100 (1975).

The First Use Tax is not capable of being apportioned fairly because it is levied on the full volume of the gas flowing through Louisiana. The tax bears no relation to the proportion of each company's pipeline which is in Louisiana or to the apportioned value of the activity carried on by each taxpayer enterprise in Louisiana.

In *Michigan-Wisconsin Pipeline Co.* v. *Calvert,* 347 U.S. 157 (1954), this Court invalidated a Texas statute imposing a tax on the gathering of gas into a pipeline, holding, first, that the tax was impermissibly levied simply on movement of the gas in interstate commerce, and, second, that upholding the tax would invite other states to tax the first "taking" of the gas at their borders, resulting in resurrection of "the customs barriers which the Commerce Clause was designed to eliminate." 347 U.S. at 170.[19]

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[18] *Developments in the Law, Federal Limitations on State Taxation of Interstate Business,* 75 Harv. L. Rev. 953, 964 (1962).

[19] This decision was recently reaffirmed by this Court in *Department of Revenue* v. *Ass'n of Washington Stevedoring Companies,* 435 U.S. 734, 749 (1978):

> Today's decision does not question the *Michigan-Wisconsin* judgment, because Washington apportions its business and occupation tax to activity within the State. Taxes that are not so apportioned remain vulnerable to Commerce Clause attack.

The First Use Tax presents a threat of proliferation of similar state taxes identical to the threat which resulted in the striking down of the tax in the *Michigan-Wisconsin case*. If Louisiana is allowed to tax the first sale, transportation to a processing or storage facility, measuring, manufacturing, or other use of gas, every other state in which a pipeline is located will have license to do likewise. The rates which consumers pay for gas would then depend not on factors rightfully regulated by the Commission under the Natural Gas Act, but on the number of states through which the gas passes before reaching its point of distribution. Natural gas will not be a competitive source of fuel in any state except those which produce it and the adjacent or nearly adjacent states. Such a result is clearly prohibited under the Commerce Clause.

CONCLUSION

For the foregoing reasons, AGD respectfully submits that the Louisiana First Use Tax on Natural Gas violates both the Supremacy Clause and the Commerce Clause of the United States Constitution and must be declared invalid.

Certificate of Service

I hereby certify that on this 23rd day of October, 1979, three copies of the foregoing Motion for Leave to File Brief *Amicus Curiae* On Behalf of Associated Gas Distributors and Brief Amicus Curiae were mailed, postage prepaid, to all counsel of record.

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